

SPECTRUM ACQUISITIONS, INC.

May 29, 2008

VIA ELECTRONIC FILING

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-A325
Washington, D.C. 20554

Re: WT Docket No. 02-55
Opposition to Sprint Nextel Waiver Request

Dear Ms. Dortch:

In the above-referenced proceeding,¹ Nextel Communications, Inc. ("Nextel") entered into an agreement with the Federal Communications Commission ("FCC" or the "Commission") with respect to the reconfiguration of the 800 MHz Private Land Mobile Radio Band ("PLMRB")(806-824 MHz/851-869 MHz). Pursuant to such agreement Nextel would vacate all of its Economic Area ("EA") and site licenses below 817 MHz/862 MHz and pay all of the reasonable costs directly related to the reconfiguration of the PLMRB.² In exchange therefor, the FCC allowed Nextel, Nextel Partners and the licensees who had executed purchase option or construction and management agreements with Nextel (collectively, the "Nextel Control Group")³ to move their respective EA-licensed spectrum to the former NPSPAC Channels on a 1:1 clean and

¹ Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, et al., *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, 19 FCC Rcd 14969, 15021-45 15069 ¶¶ 88-141, 189 (2004) as amended by Erratum, 19 FCC Rcd 19651 (2004), and Erratum, 19 FCC Rcd 21818 (2004) (*800 MHz Report and Order*). Supplemental Order and Order on Reconsideration, 20 FCC Rcd 16015 (2005) as amended by Erratum, 20 FCC Rcd 18970 (2005) (*800 MHz Supplemental Order*); and Second Memorandum Opinion and Order, 22 FCC Rcd 10467 (2007).

² *800 MHz Report and Order*, ¶¶ 5 & nn. 14-16, 10-12, and 23.

³ See, e.g., Nextel Communications, Inc. Comment, Docket No. 02-55 (May 6, 2002), at 2 & n.4; Appendix A; Nextel Communications, Inc., Reply Comment, Docket No. 02-55 (August 7, 2002), at 9-10 & nn. 9-11; Appendix I.

contiguous basis and convert their respective site-licensed spectrum to EA-licensed spectrum on a 1:1 clean and contiguous basis.⁴ Moreover, the Commission exclusively awarded Nextel a 10 MHz nationwide license in the 1.9 GHz band.⁵

According to Nextel, its Control Group held sufficient spectrum in Channels 121-150 and 151-440 to accommodate the relocation of Non-Nextel Control Group EA- and site-licensed Channels from Channels 1-120 and 441-600 and provide such relocated licensees with “comparable facilities.”⁶ In the *800 MHz Report and Order*, the FCC envisioned that reconfiguration of the PLMRB would occur as follows:

- “1) Nextel shuts down its General Category channels and relocates all non-Nextel General Category licensees. It temporarily shifts many of its operations to “green space” at 900 MHz.
- 2) NPSPAC licensees relocate to six megahertz of spectrum in the former General Category space at Nextel’s expense.
- 3) Nextel relocates its systems from the [900 MHz] green space and from the interleaved portion of the [PLMRB] into the vacated NPSPAC channels; surrendering its rights below 817 MHz/862 MHz spectrum in the process.
- 4) Any remaining relocations necessary to effect complete reconfiguration of the [PLMRB] in that [NPSPAC] region are made at Nextel’s expense, e.g., moving public safety systems out of the Expansion band.”⁷

In the *800 MHz Report and Order*, the Commission explicitly recognized that at least temporarily Nextel would suffer a loss of 800 MHz spectrum capacity.⁸ To ameliorate such loss, the FCC modified its 900 MHz rules to allow Nextel exclusively to file applications for “green space” site licenses and use the granted licenses on a BTA-wide during the 800 MHz PLMRB rebanding process.⁹ The Commission also allowed Nextel

⁴ See Consensus Parties, Supplemental Comment, Docket No. 02-55 (December 24, 2002), at 14.

⁵ *800 MHz Report and Order*, ¶¶ 33-35.

⁶ See Nextel Communications, Inc., Opposition to Request for Stay, Docket No. WT 02-55, filed November 16, 2005.

⁷ See *800 MHz Report and Order* at ¶¶ 32 and n.71, 198, 301 and n. 712.

⁸ *Id.* at ¶ 35 & n. 74.

⁹ *Id.* at ¶¶ 6 & n. 18 and 198. See 47 C.F.R. §90.621 (f) in Appendix C of the *800 MHz Report and Order*.

to increase its “credit” against its rebanding payment obligation by including funds spent to reconfigure its own systems.¹⁰

In the Third Memorandum Opinion and Order (released September 12, 2007),¹¹ the Commission determined that Sprint Nextel had failed to meet its eighteen (18) month benchmark established in the *800 MHz Supplemental Order*¹² of relocating all Non-Nextel and Non-SouthernLINC licensees from Channels 1-120 in the first twenty (20) NPSPAC Regions the Transition Administrator had scheduled for band reconfiguration.¹³

As a result, the FCC determined to impose two new benchmarks upon Sprint Nextel:

1. After January 1, 2008, Sprint Nextel must relocate its Channels 1-120 within sixty (60) days of receiving a written request from a NPSPAC licensee to clear such spectrum for testing purposes or to commence operations.¹⁴
2. Other than in Wave 4 border areas, Sprint Nextel must relocate its Channels 1-120 not later than June 26, 2008 regardless of whether NPSAPC licensees are prepared to relocate by that date.¹⁵

Sprint Nextel had challenged the Commission’s determination to impose the above additional benchmarks on the grounds that they “would seriously harm public safety” and “squander scarce spectrum resources.”¹⁶ Finding to the contrary, the FCC set forth four public policy objectives for its decision:

1. elimination of the risk that harmful interference would occur to relocating NPSPAC licensees from Sprint Nextel’s sites otherwise continuing to operate in Channels 1-120;
2. simplification and expedition of the transition process since NPSPAC licensees no longer would need to coordinate their relocation with Sprint;
3. hasten the availability of Channels 1-120 for new public safety facilities; and
4. afford Sprint Nextel access to former NPSPAC Channels more quickly.¹⁷

¹⁰ *Id.* at ¶¶35 & n. 74 and 207; *800 MHz Supplemental Order*, 19 FCC Rcd 25150 ¶ 69; Third Memorandum Opinion and Order, 22 FCC Rcd 17209, at 17217 ¶ 24, 17219 & n. 61, ¶ 28 (2007)(*800 MHz Third Order*).

¹¹ *800 MHz Third Order*, 22 FCC Rcd 17209 (2007).

¹² *800 MHz Supplemental Order*, 19 FCC Rcd at 15130 ¶ 53.

¹³ *Id.*

¹⁴ *800 MHz Third Order*, at 17217 ¶ 23.

¹⁵ *Id.*, at 17217-18, ¶ 25.

¹⁶ Sprint Nextel Ex Parte Letter, filed September 6, 2007, at 1-2.

¹⁷ *Id.*, at 17218 ¶ 26.

However, the Commission noted that if a NPSPAC licensee were granted a waiver so that it may relocate to certain Channels 1-120 in a particular market after June 26, 2008, it would allow Sprint Nextel to file a petition to remain temporarily on the Channels 1-120 to which the NPSPAC licensee's channels would have been relocated.¹⁸ In any such petition, the FCC required a showing by Sprint Nextel that

1. public safety would not be adversely affected;
2. it has no reasonable alternative; and
3. granting such petition otherwise would be in the public interest.¹⁹

Thirty days following the release of the *800 MHz Third Order*, Sprint Nextel filed a Petition for Review in the D.C. Circuit Court of Appeals.²⁰ In its petition, Sprint Nextel maintained that the FCC's decision in the *800 MHz Third Order* that it vacate its Channels 1-120 even if the NPSPAC licensees were not ready to relocate their respective channels was arbitrary and capricious under 5 U.S.C. § 706 (2) (A).

In determining this issue, the Court found a "regulatory decision balancing competing goals is valid if the agency can demonstrate that its resolution advances at least one of those objectives and that its decision-making process was regular."²¹ Here the Court found that the Commission delineated four reasons why its decision advanced the public interest.²²

Moreover, the Court found the Commission had considered the possible harm that would occur to Nextel's network by requiring it to vacate its Channels 1-120 by June 26, 2008. However, it found the FCC's policy choice that "NPSPAC licensees take precedence" over Nextel's network was a "rational policy judgment" and therefore affirmed the Commission's challenged orders.²³

One day prior to the release of this decision, Sprint Nextel filed a Waiver Request with the FCC. In such Request, Sprint Nextel effectively conceded that it would have to vacate its 800 MHz licenses in Channels 121-150 and 151-360 (the "Interleave

¹⁸ *Id.*, at 17218 ¶ 27.

¹⁹ *Id.*

²⁰ *Sprint Nextel Corporation v. Federal Communications Commission*, 07-1458 (D.C. Cir. May 2, 2008).

²¹ *Id.* at 8 citing *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 234 (D.C. Cir. 2000).

²² See text above discussing the *800 MHz Third Order* and n. 17 *infra*.

²³ *Sprint Nextel Corporation v. Federal Communications Commission*, at 10.

Channels”), 361-400 (“Expansion Band”) and 401-440 (“Guard Band”) by the June 26, 2008 deadline imposed by the Commission in the *800 MHz Third Order*.²⁴

However, Sprint Nextel then noted relocating public safety licensees has proved “far more complex than initially anticipated and continues to challenge the resources of vendors, consultants, engineering companies and public safety agencies.”²⁵ Observing that a majority of NPSPAC licensees have sought waivers of their respective relocation obligation, Sprint Nextel then requested a **blanket** waiver of its obligation to vacate **any** of its licenses in Channels 1-120 until the expiration of a sixty day period following notification of it by a NPSPAC licensee that such licensee is prepared to relocate its respective channels in a particular NPSPAC Region or Regions.²⁶

Sprint Nextel tied its blanket waiver request to the narrow licensee-, frequency- and market-specific request afforded by the FCC in the *800 MHz Third Order* discussed above.²⁷ According to Sprint Nextel its blanket waiver request fit within the Commission’s previously announced guidelines since there is

1. no public safety licensees will be harmed in any way since Sprint Nextel remains committed to providing replacement channels to public safety licensees within sixty days of being notified that the public safety licensee is ready to relocate its respective channels; and
2. no reasonable alternative to such request since relocating Sprint Nextel facilities to the 900 MHz band or constructing additional cell sites are not “viable alternatives.”²⁸

²⁴ See *800 MHz Third Order*, at 17218-19 ¶ 28.

²⁵ Sprint Nextel Waiver Request, Docket No. WT 02-55 (May 1, 2008), at 2.

²⁶ *Id.*, at 2-3. Actually, as of May 16, 2008, virtually all of the NPSPAC licensees have requested and been granted a waiver of their respective relocation obligation. Certain NPSPAC licensees have requested waivers that would extend their respective relocation by several years. See, e.g.,

²⁷ *800 MHz Third Order*, at 17218 ¶ 27.

²⁸ According to Sprint Nextel the number of available 900 MHz licenses are insufficient to “make up for the shortfall Sprint Nextel will suffer at 800 MHz.” Sprint Nextel Waiver Request (May 1, 2007), at 2. Sprint Nextel detailed the disruption to its iDEN network from vacating Channels 1-120 without the availability of NPSPAC Channels as replacement spectrum in a declaration by its Senior Vice President, Field Engineering and Operations submitted confidentially due to competition concerns. Sprint Nextel Waiver Request, at 3 & n. 9.

Finally, Sprint Nextel maintained that such waiver would promote the public interest since it would reduce service disruption to Sprint Nextel's iDEN customers many of whom are employees of public safety organizations.²⁹

In essence, Sprint Nextel's waiver request seeks to reverse both the Commission's policy determination and resulting presumption in its *800 MHz Third Order*. There the FCC balanced the competing considerations of minimizing interference to relocating NPSPAC licensees and accelerating their relocation by eliminating the need for costly and lengthy frequency coordination versus the disruption to Sprint Nextel's iDEN network in favor of the NPSPAC licensees.³⁰ Sprint Nextel's waiver request simply denies the four public policy interests the FCC found promoted by its orders in the 800 MHz Third Order and upheld recently by the D.C. Circuit Court of Appeals.³¹

Re-arguing that preserving its iDEN network's spectrum capacity is more important than the NPSPAC licensees, the Sprint Nextel waiver request would grant all of its licenses in Channels 1-120 an extension of its relocation obligation regardless of such licenses' individual circumstances.

Sprint Nextel argues that in general it would suffer serious disruption to its iDEN network if it were forced to relocate from Channels 1-120 under the Commission's approach adopted in the *800 MHz Third Order* and that generally no viable alternative is available since the 900 MHz Channels generally do not replace the shortfall of 800 MHz spectrum to be vacated and the construction of additional cell sites would be too time consuming and costly. However, for many of its licenses in Channels 1-120 in many NPSPAC Regions this may not be the case. If the Commission upholds its policy determination that it is more important to minimize, if not eliminate future interference to relocating NPSPAC licensees then it would seem both logically consistent and required that it continue its presumption that absent a particularized showing meeting

²⁹ *Id.*, at 4. Sprint Nextel then argued conversely that maintenance of the FCC's orders set forth in the *800 MHz Third Order* was contrary to the public interest since it will not accelerate rebanding, cause spectrum to lie fallow and disrupt Nextel's service to its customers. *Id.* & n. 14. It is important to note that the Association of Public Safety Communications Officials—International ("APCO") supports the FCC's orders set forth in its 800 MHz Third Order. See APCO Letter to FCC, Docket No. WT 02-55 (January 11, 2008).

³⁰ *800 MHz Third Order*, at 17217 ¶ 24.

³¹ *Id.*, at 17218 ¶ 26. See *Sprint Nextel Corporation v. Federal Communications Commission*, at 10.

the FCC's extension request standards set forth in the *800 MHz Third Order Sprint Nextel's licenses in Channels 1-120 must relocate by June 26, 2008.*³²

In weighing the competing policy considerations, we believe that it is important to place them in an historical context. This is not the first occasion Sprint Nextel has sought to delay relocation of its licenses and expenditure of funds.

As noted above, Sprint Nextel and the Commission entered into an agreement that was memorialized by the *800 MHz Report and Order* and the *800 MHz Supplemental Order*. Such agreement was based upon certain written representations by Sprint Nextel:

1. it had adequate 800 MHz spectrum holding to provide all relocating licensees with "comparable facilities;"
2. it could accommodate a temporary 800 MHz spectrum shortfall during the rebanding process through the use of new and improved iDEN technology to be developed by Motorola and changes in the FCC's rules that would allow it exclusive access to 900 MHz "green space" and use of such site licenses on a BTA-wide basis;
3. it would pay all "reasonable" costs directly related to the rebanding process; and
4. it would meet certain rebanding schedules established by the FCC.

In exchange for such representations, the Commission provided Nextel and SouthernLINC the favorable treatment of both their EA- and site-licensed spectrum discussed above and Sprint Nextel an exclusive nationwide allocation of 10 MHz in the 1.9 GHz band.

Sprint Nextel now maintains that for reasons beyond its control its representations that formed the basis of the Commission's rebanding orders no longer are true and correct. Impliedly, it is maintaining that it should be allowed to amend its rebanding obligations while retaining its rebanding benefits.

In December 2005 Sprint Nextel likewise sought to delay its rebanding obligations by postponing the start of the reconfiguration process from June 27, 2005 until sixty days following the publication of the FCC's Memorandum Opinion and Order on October 5,

³² Interestingly, Sprint Nextel previously submitted a blanket request that to operate on all vacated channels below 817 MHz/862 MHz during rebanding. The Commission rejected such request because it "could provide Nextel an incentive to delay completing band reconfiguration for as long as possible." *800 MHz Supplemental Order*, 19 FCC Rcd at 25144.

2005.³³ Press reports in September 2006 indicated that Sprint Nextel then desired to extend the rebanding process by two years.³⁴

800 MHz rebanding proceeding participants have challenged Sprint Nextel's previous attempts to delay its rebanding obligations. In April 2007 AT&T Mobility submitted a fifteen page letter to the Commission in which it recommended that the FCC adopt additional benchmarks, revise the conditions attached to the grant of the nationwide 1.9 GHz band license, impose enforcement action and monetary forfeitures for Sprint Nextel's failure to meet its eighteen month deadline to relocate Non-Nextel and Non-SouthernLINC licensees from Channels 1-120.³⁵

According to these participants the primary reason for the delay in the rebanding process was Sprint Nextel's strategy in its dealings with public safety licensees with respect to planning activities, services and costs³⁶ and its requirement that all public safety licensees enter non-disclosure agreements that prohibited licensees from sharing information³⁷ with one another regarding terms and conditions of their planning and relocation agreements. Indeed, according to these participants the delay in the rebanding process could be related to Sprint Nextel's commercial spectrum needs.³⁸

Much like these participants we believe that the Commission should maintain its position that absent a particularized showing by Sprint Nextel satisfying the FCC's three-prong test, it should be required to vacate its licenses in Channels 1-120 on June 26, 2008. As the FCC determined in its *800 MHz Third Order*, the needs of NPSPAC licensees take precedence over those of Sprint Nextel's iDEN network.

³³ See Sprint Nextel Comment, WT Docket No. 02-55 (December 1, 2005), at 7. APCO strongly opposed Sprint Nextel's delay request. See APCO Letter, Docket No. WT 02-55 (December 6, 2005). The Commission rejected Sprint Nextel's request in January 2006. See Letter from Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, Docket No. WT 02-55 (January 31, 2006).

³⁴ See *Call for 800 MHz rebanding extension raises public safety's ire*, RCR Wireless News (September 25, 2006). Such reports were based upon an interview by Robert Foosaner, Sprint Nextel's Senior Vice President and Chief Regulatory Officer with *Communications Daily*. In the Spring of 2007, Sprint Nextel's SEC filings continued to reflect that company's belief that it will not complete rebanding within the thirty-six month period set forth in *800 MHz Report and Order*. See Sprint Nextel 2006 10-K at 13.

³⁵ AT&T Mobility Letter, Docket No. 02-55 (April 19, 2007).

³⁶ *Id.*, at 7.

³⁷ *Id.*

³⁸ *Id.*, at 10.

Pursuant to section 1.1206(b) (2) of the Commission's rules, 47 C.F.R. § 1.1206(b) (2), this letter is being filed electronically for inclusion in the public record of this proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Richard Cracroft', with a stylized, cursive script.

Richard Cracroft
Executive Vice President